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PAUL W. MARTIN
NCR CORPORATION, LAW DEPT.
3097 SATELLITE BLVD., 2nd FLOOR
DULUTH GA 30096

MAILED

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OFFICE OF PETITIONS

In re Application of
Walter
Application No. 09/751,630
Filed: 29 December, 2000
Attorney Docket No. 9003

DECISION

This is a decision on the petition filed on 27 November, 2009, pursuant to 37 C.F.R. §1.137(b) for revival of an application abandoned due to unintentional delay.

NOTE:

The instant petition appears not to have been docketed for consideration until this writing. Petitioner is reminded that cycle time on most matters in the Office of Petitions (OP) in fact is on the order of 90 to 120 days, and should Petitioner not receive a response from OP on a matter submitted to the Office for consideration by OP, Petitioner may wish immediately to seek Status of the matter.

Moreover, Petitioners always are reminded that regulatory provisions mandate limited time periods for seeking relief. (*e.g.*, the regulations at 37 C.F.R. §1.181).

In addition, Petitioner failed to submit the petition fee required herein, notwithstanding Petitioner's statement that the fee was submitted. Petitioner is reminded that the Office may not act on the petition in the absence of submission of the fee. It appears from examination of the record that a general authorization was submitted on deposit of the application and the petition fee was charged to Deposit Account 14-0225 as authorized. Petitioner is cautioned to be attentive to such matters.

Petitioner failed to provide a direct-line telephone number at which he might be contacted. When the Office attempted to contact Petitioner, the telephone access system failed on a number of occasions—further, when the system did operate, Petitioner was unavailable over several calls, and Petitioner's telephone access system could not locate the named signer of the transmittal papers. As of this writing, Petitioner has not responded to messages left for him regarding this matter.

The petition under 37 C.F.R. §1.137(b) is **GRANTED**.

As to the Allegations
of Unintentional Delay

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a reply, a proper statement and/or showing of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee.

BACKGROUND

The record reflects as follows:

Petitioner failed to reply timely and properly to the Notice of Non-Compliant Appeal Brief mailed on 21 January, 2009, with reply due absent an extension of time on or before 21 February, 2009.

The application went abandoned by operation of law after midnight 21 February, 2009.

(The record reflects an incomplete and untimely submission by Petitioner on 25 September, 2009.)

It does not appear that the Office mailed a Notice of Abandonment before a petition was filed.

On 27 November, 2009, Petitioner filed, *inter alia*, a petition (without fee, however, after examination of the record, it appears that a general authorization was submitted on deposit of the application and the fee is charged as authorized) pursuant to 37 C.F.R. §1.137(b), a reply in the form of an amended Appeal Brief, and made a statement of unintentional delay.

The record (including the petition filed on 27 November, 2009) does not necessitate a finding that the delay between midnight 28 February, 2009 (the date of abandonment), and 27 November, 2009 (the date of the filing of grantable petition) and the further delay in seeking Status and/or otherwise seeking to have this matter addressed, was not unintentional.

Rather, the Patent and Trademark Office is relying in this matter on the duty of candor and good faith of Petitioner/ Counsel Paul W. Martin (Reg. No. 34,870) when accepting Petitioners' representation that the delay in filing the response was unintentional.¹

¹ See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing the statement required by 37 C.F.R. §1.137(b) to the Patent and Trademark Office).

The availability of applications and application papers online to applicants/practitioners who diligently associate their Customer Number with the respective application(s) now provides an applicant/practitioner on-demand information as to events/transactions in an application.

Out of an abundance of caution, Petitioners always are reminded that those registered to practice and all others who make representations before the Office **must** inquire into the underlying facts of representations made to the Office and support averments with the appropriate documentation—since all owe to the Office the continuing duty to disclose.²

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).³

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a Petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

Unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.⁴))

As to Allegations of Unintentional Delay

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a reply, a proper statement of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee.

It appears that the requirements under the rule have been satisfied.

CONCLUSION

Accordingly, the petition pursuant to 37 C.F.R. §1.137(b) is **granted**.

² See supplement of 17 June, 1999. The Patent and Trademark Office is relying on petitioner's duty of candor and good faith and accepting a statement made by Petitioner. See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing statements to the Patent and Trademark Office).

³ 35 U.S.C. §133 provides:

35 U.S.C. §133 Time for prosecuting application.

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

⁴ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

The instant application is released to the Technology Center/AU 3733 for further processing in due course to include the submission of the Examiner's Answer.

Petitioner may find it beneficial to view Private PAIR within a fortnight of the instant decision to ensure that the revival has been acknowledged by the TC/AU in response to this decision. It is noted that all inquiries with regard to status need be directed to the TC/AU where that change of status must be effected—that does not occur in the Office of Petitions.

Telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3214—it is noted, however, that all practice before the Office is in writing (see: 37 C.F.R. §1.2⁵) and the proper authority for action on any matter in this regard are the statutes (35 U.S.C.), regulations (37 C.F.R.) and the commentary on policy (MPEP). Therefore, no telephone discussion may be controlling or considered authority for Petitioner's action(s).



/John J. Gillon, Jr./
John J. Gillon, Jr.
Senior Attorney
Office of Petitions

⁵ The regulations at 37 C.F.R. §1.2 provide:

§1.2 Business to be transacted in writing.

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.